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Earning And Keeping Your Fees

Fee agreements are the second most important document of any legal practice

By Steven A. Lewis & Ellen Peck

Your fee agreement is the second most important document in your law the attorney with a terrific window of opportunity to do much practice. (Because of the severity of disciplinary action for failure to maintain proper trust account records, we consider trust account records the most important law practice documents.)

A properly drafted fee agreement is the foundation of your earning your living, assisting in setting and earning fees and recouping costs. In a dispute, it can assist in fee retention. Fee agreements also assist in managing risk arising from legal malpractice and disciplinary liability.

A fee agreement presents more.

Why? After the attorney-client relationship commences, the lawyer owes the client fiduciary duties of the highest character. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 189-190 [98 Cal.Rptr. 837].)

The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom the trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party. (Barbara A. v. John G. (1983) 145 Cal.App.3d 369, 383 [193 Cal.Rptr. 422].)

The scope of these duties is very broad, comprising duties of:

Undivided loyalty to protect the client's interests. (Flatt v. Superior Court (1995) 9 Cal.4th 275.)

Confidentiality of client communications and information. (B&P Code S6068(e); Evid. Code SS950 et seq.; Code Civ. Proc. S2018.)

Competence in representing clients with skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess. (Lucas v. Hamm (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821]; B&P Code S6067; rule 3-110(A), Cal. Rls. Prof. Cond.)

Communication with the client in the following respects. (1) Whatever information the attorney has or may acquire in relation to the subject matter of the transaction (Ball v. Posey (1986) 176 Cal.App.3d 1209, 1214; Beery v. State Bar (1987) 43 Cal.3d 802, 812-813); (2) all facts and circumstances necessary to enable the client to make free and intelligent decisions regarding the subject matter of the representation (Lysick v. Walcom (1968) 258 Cal.App.2d 136, 147 [65 Cal.Rptr. 406]); (3) to advise the client of significant developments in the client's matter and to respond to client status inquiries (B&P Code S6068(m) and rule 3-500, Cal. Rls.

Prof. Cond.); and (4) the terms and conditions of a settlement offer [criminal cases — any offer; civil cases — written offers] (rule 3-510, Cal. Rls. Prof. Cond.).

Exercise independent judgment, including rendering candid advice, even unpleasant facts and alternatives. (Vapnek, Tuft, Peck & Weiner (1997) 1 The Rutter Group California Practice Guide — Professional Responsibility 3-2 (3:8); B&P Code S6106; see also rules 1-600(A) and 3-310(F)(1), Cal. Rls. Prof. Cond. and Model Rule 2.1, ABA Model Rls. Prof. Cond.)

Scrupulous honesty and protection of client funds and property. (Prob. Code S16004(c); rule 4-100, Cal. Rls. Prof. Cond.; B&P Code S6106; Blackmon v. Hale (1970) 1 Cal.3d 548 [83 Cal.Rptr. 194].)

Once we accept the heavy mantle of fiduciary duties to our clients, we lose the full opportunity to protect our own interests unless it is in the best interests of our clients.

Before our relationship begins, however, we have this wonderful window of opportunity to bargain about the terms and conditions of our employment, absent any fraud or undue influence, at arm's length with any prospective client. (Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 913 [26 CalRptr.2d 554, 558].) The fee agreement is not only the instrument by which you and the client seal a contract for legal services, fees and costs, but also a tool by which you can structure the terms and conditions of your attorney-client relationship.

A properly drafted fee agreement can:

Structure the course of the attorney-client relationship;

Provide a process of dispute resolution with our clients;

Add provisions which will protect us from the overbearing client; and

Shift the risk of loss or the burden of costs to the client in unusual circumstances.

Your fee agreement should be reviewed once a year to update it after changes in the case law. That review is also an opportunity to be creative and proactive. Any client problems which have plagued your practice should be evaluated with the following points in mind:

Could the problem have been prevented by one or more provisions in your fee agreement?

Could you have defended yourself better if there had been one or more provisions in your fee agreement?

Would your risk have been lessened by one or more provisions in your fee agreement?

Are there aspects of your relationships with clients you would like to change which would be facilitated by a provision in your fee agreement?

If your answer was "yes" to one or more of these questions, add some provisions to your fee agreement so that past problems are resolved in future relationships with clients.

Drafting fee agreements

We've told you how important the fee contract is to every lawyer's practice. The next question is: What should be in your fee agreement? The answer in large part depends upon the nature of your practice and your clientele. The same fee agreement does not work for all practices, for all clients or for all matters. In developing forms for your office, you need to examine who you are as a lawyer, who you serve as clients, and the law.

The first place to look in developing a good fee agreement is the Business & Professions Code. Of most universal interest, S6147 lays out what matters must be covered in contingent fee contracts, while S6148 does the same for hourly and other non-contingent fee agreements.

Next, you should look to the relevant Rules of Professional Conduct applicable to financial arrangements between attorneys and clients, including the rules in Chapter 3 (Professional Relationship with Clients) and Chapter 4 (Financial Relationship with Clients).

These rules will give you some guidance as to disclosures that should (or in some situations must) be made in fee agreements as well as provisions that should not be included.

Then, if you want to ensure that your fee agreement properly serves the two players it is designed to protect, your clients and you, you must also look to relevant case law.

You don't need to reinvent the wheel of fee agreements. A number of publications provide model fee agreements (the State Bar through the Internet [www.calbar.org]; Continuing Education of the Bar, Fee Agreement Forms Manual; Vapnek, Tuft, Peck & Weiner (1997) The Rutter Group California Practice Guide — Professional Responsibility, at Chapter 5, Forms; and Lewis & Peck (1998) Lawyer's Handbook on Fees and Fee Agreements.) These publications have models for your fee agreement which you can adopt "off the shelf" or modify to suit your particular area of the law, clientele and special matters.

General matters

As you can see, whole books have been written about what to include in your fee agreement and this article is but the tip of the iceberg of possible fee agreement provisions. We wanted to call to your attention the importance of certain general provisions defining who is the client; who is not the client in relevant circumstances; what is the scope of the legal services; and what is not within the scope. In our experience, these areas are given less attention by lawyers, thus creating greater risk of fee disputes, legal malpractice claims or disciplinary complaints.

Who is the client?

Surprisingly, many fee agreements do not define who is the client who is to receive the attorney's services. This is especially important in the following circumstances:

Multiple parties. Many times a number of parties walk into your office to the first interview. In this situation, it is important to ferret out (1) who the intended client is from among the potential clients, and (2) which client or clients you want to represent. It is then important to memorialize the decision in the fee agreement. There are a number of factors you can consider, including: If you represent two or more parties in the same matter, you probably have a potential conflict of interest, requiring compliance with rule 3-310 (C)(1).

Organization v. individuals.

If the individuals are partners in a general partnership, are you going to represent the partners individually or the partnership or both?

If you meet with homeowners, are they intending that you represent the homeowners association, the members individually, or both?

If there is a corporation involved, will you be representing the corporation or its constituents or both?

If you are to represent any one of the organizations above, review rule 3-600 of the Rules of Professional Conduct for necessary compliance, and document your compliance through the fee agreement.

If the prospective clients envision your preparation of documents formalizing an ostensible partnership and desire you to represent the partnership in formation, review whether there are sufficient indicia of an ostensible or oral partnership in order to permit you to represent the partnership in formation as an entity. (See e.g. Beuhler v. Shardellati (1995) 34 Cal.App.4th 1527 [41 Cal.Rptr. 104].) If there is not sufficient agreement among the partners concerning the form of organization and their respective duties and liabilities to each other, you may have to represent the individuals.

Capacity. Define the capacity in which you are representing a client. If the client is an officer, director or managing agent of a corporation, do you represent the individual in their

representative or individual capacity? If the person is a trustee or executor of an estate, are you representing the client in their representative or individual capacity? The answer may change the nature of your duties, especially whether you have duties to reveal confidential information to a successor in interest. (See Moeller v. Superior Court (1997) 16 Cal.4th 1124.)

Defining who is not the client. Third party liability is expanding, a few examples of which are set forth below. Your fee agreement is an ideal place to set forth the parties you do not intend to represent.

1. Limited partnerships. Evolving case law has recognized that although a lawyer may represent a partnership (general or limited) without representation of individual partners, the lawyer may owe duties to general or limited partners not to favor one partner over another concerning business opportunities. (Johnson v. Superior Court (1995) 38 Cal.App.4th 463.) It is important to clarify that the lawyer does not represent individual partners if the lawyer intends to represent solely the organization.

2. Duties to client's spouse in personal injury matters. As set forth below, Meighan v. Shore (1995) 34 Cal.App.4th 1025, 1044, held that an attorney who represented a husband in seeking recovery for personal injuries had a duty to the non-client wife regarding a cause of action for loss of consortium. Where more than one person comes to an initial interview, it is important to clarify through memorialization in the fee agreement which of those persons is not the client and that they should seek independent counsel for their legal needs.

3. Confusion over the rights of third party payers. It is not uncommon to have another party pay for a client's legal services. Not only should you comply with rule 3-310(F), Cal. Rls. Prof. Cond., but also you should specifically and expressly indicate that the payer is not a client and will not be receiving legal services to avoid confusion.

Defining scope

One of the most important provisions in any fee agreement is the clause defining the scope of the lawyers' services. B&P Code S6148 (governing hourly and other non-contingent fee agreements) requires a statement of: "The general nature of the legal services to be provided to the client." (B&P Code S6148(a)(2).) Surprisingly, B&P Code S6147 (governing contingent fee contracts) contains no such requirement. Yet we believe that in order to protect the client and the lawyer and to avoid miscommunications, every fee agreement should include a very clear and concise description of the nature of the legal services to be provided.

If you are representing the client in litigation, identify the litigation and the specific scope of the representation within the context of that litigation. If you are representing a client in connection with a transaction or a dispute that is not in litigation, clearly identify the matter and the scope of the representation (e.g., the purchase of the Famous Fast Food Franchise in Fremont). It is also important to identify clearly the parties you are representing (with conflict waivers if multiple parties), related parties you are not representing (with non-engagement letters to those persons), and the adverse parties (whether or not the client is in litigation). If your fee agreements already clearly define the scope of the services to be rendered, you may be thinking, "Well, I'm in good shape with my fee agreements." Well, think again and keep reading.

Related services not provided

Under California case law, it can now be argued that it is not enough to specify the scope of the attorney's undertaking. Rather, some courts are now telling lawyers they must also advise their clients what related services they will not be performing.

The first case on this issue was Nichols v. Keller (1993) 15 Cal.App.

4th 1642, 19 Cal.Rptr.2d 601. In Nichols, the attorney agreed to represent the client in a pending workers' compensation claim. There was no mention of the attorney representing the client on a third party tort claim. The client then failed to file a third party claim in a timely manner and sued his lawyer for not advising him of the time deadline. The Nichols court stated that the attorney was not obligated to represent the client in the third party tort case, but that he did have a duty to tell the client that: (1) there may be other remedies the attorney will not investigate, and (2) other counsel should be consulted on such matters.

The next case on this same subject went even further. In Meighan v. Shore (1995) 34 Cal.App.4th 1025, 40 Cal.Rptr.2d 744, the court noted that the attorney representing one spouse in a medical malpractice action had no obligation to represent the other spouse in a loss of consortium case. However, the court went on to hold that if the attorney was not going to handle the loss of consortium case, he owed a duty to both the client and the client's spouse to advise them of the loss of consortium remedy and to send them to the counsel for consultation.

In a series of seminars we recently presented to California lawyers insured by Lawyers' Mutual Insurance Co., we asked lawyers to tell us where they saw the risk in their own practices if they failed to go the extra step and tell clients what related matters they were not handling or investigating. We received a wide variety of responses, including: (1) tax advice in virtually all litigation and transactional matters; (2) cross-complaints in insurance defense or other cases; (3) collection activities and appellate work, particularly in contingent fee cases; (4) bankruptcy or asset protection advice in a wide variety of areas where the concern arises, including family law and litigation where there are uninsured claims against the client; (5) disputes with health care providers or insurers in personal injury matters; (6) litigation or arbitration in transactional or estate matters; (7) criminal law proceedings in family law cases where spousal abuse is raised as an issue; and (8) intellectual property issues in business transactions.

From our conversations with these lawyers, another reason to make careful disclosures about what is and is not included in the scope of the attorney's representation surfaced. Different lawyers practicing in the same communities and in the same areas of law define the scope of their representation and the decision whether to handle related matters differently. As such, it is beneficial both to the client and to the lawyer to lay out clearly in the fee agreement (and to discuss clearly during the meeting with the client relating to the fee agreement) how the attorney defines the scope of the representation. Clarity not only avoids confusion and misunderstandings, it also leads to better client relations and reduces the risk of financial and other conflicts with your clients.

Responsibilities of the parties

Closely related to the provisions in your fee agreement defining and limiting the scope of representation are the provisions setting out the respective responsibilities of the attorney and the client. Interestingly, the B&P Code once again requires this clause to appear in non-contingent fee contracts, but not in contingent fee contracts. (B&P Code SS6148(a)(3), 6147.) Nevertheless, we very strongly believe that all fee agreements, contingent and otherwise, should include a paragraph on the respective responsibilities of the attorney and the client.

In this section of the agreement, the lawyer should set forth, among other things, the client's responsibilities to provide the attorney with all relevant information, to keep the attorney informed, to keep communications confidential, to appear when requested, to respond to discovery requests (in litigation), to pay the attorney's bills in a timely manner, and other important obligations. Also, if the client is going to be undertaking tasks that might otherwise be deemed to be within the scope of the attorney's duty (e.g., tendering defense of a lawsuit to a

client's insurers), those matters should also be specified in the clause relating to respective responsibilities. The attorney, in turn, can and should spell out for the client the attorney's obligation to keep the client reasonably informed about the significant developments relating to the representation. (See Rule of Professional Conduct 3-500.)

Conclusion

We hope this article has inspired you to take a fresh look at your fee agreement as a vital tool in your law office which can not only help you earn and keep fees, but also better manage the risk of malpractice and disciplinary liability. We encourage you to have your fee agreement audited on an annual basis for compliance with recent changes in statutes, rules and case law and to add other specially tailored provisions to prevent problems in your practice. May you continue to practice law with prosperity and professionalism.

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Test — Legal Ethics
1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. Attorneys' fee agreements should be limited solely to issues about compensation and recoverable costs.

2. True/False. Prior to the commencement of the attorney-client relationship, a lawyer must treat the client with fairness in negotiating the terms and conditions of future employment.

3. True/False. After the commencement of the attorney-client relationship, the attorney owes the client fiduciary duties of the highest character.

4. True/False. Except for ensuring that a fee agreement complies with the law, a lawyer has no duty to update his or her fee agreement.

5. True/False. Generally, representation of multiple parties in the same case does not involve any potential conflicts of interest.

6. True/False. When representing a corporation and its officers in the same matter, it is important to comply with rule 3-600, Rules of Professional Conduct.

7. True/False. It is important to discuss the confidentiality implications of representation of a trustee in his or her individual capacity.

8. True/False. A lawyer is not required to set forth the scope of legal services in a contingency fee contract.

9. True/False. A lawyer is not required to set forth the scope of legal services in an hourly rate contract to an individual client in which it is presumed that the services will cost in excess of $1,000.

10. True/False. Civil law suggests that lawyers must also advise their clients what related services they will not be performing.

11. True/False. A contingency fee contract is required by law to set forth the responsibilities of both lawyer and client respecting performance of the contract.

12. True/False. A lawyer cannot represent a partnership in formation.

13. True/False. From a risk management standpoint, it is important to set forth a provision in the fee agreement that the lawyer will not be providing tax advice in virtually all litigation and transactional matters, unless the lawyer intends to handle such matters as a courtesy to the client.

14. True/False. The same model fee agreement should work for all practices, all clients and for all matters.

15. True/False. It takes a long time to prepare a model fee agreement for a lawyer's particular practice because the lawyer is required to create ab initio all necessary clauses relevant to his or her practice.

16. True/False. Defining who is the client is unnecessary and spelling it out in a fee agreement is demeaning to the client.

17. True/False. Lawyers cannot limit the scope of their representation under law.

18. True/False. When a husband and wife consult with a lawyer regarding the wife's personal injuries, the lawyer has duties only to the wife who becomes the client.

19. True/False. If a group of homeowners consults with a lawyer, the lawyer automatically represents the homeowners individually.

20. True/False. A lawyer who represents solely a limited partnership may have civil duties to the limited partners who the lawyer thinks are not his clients.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which one hour will apply to legal ethics.

- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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1.	TRUE ____	FALSE _____	11.	TRUE ____	FALSE _____
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